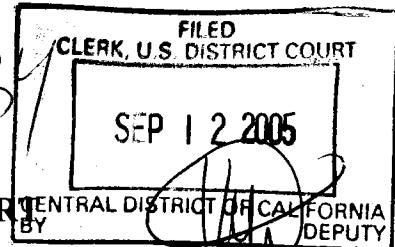
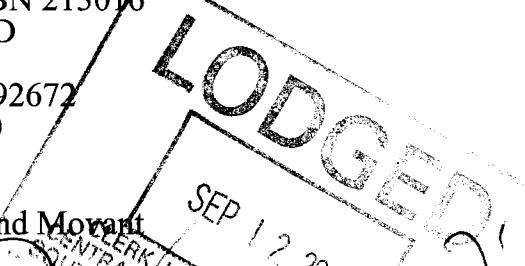


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6 KENNETH KETNER



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 KENNETH KETNER, and  
14 ALLEN JOHNSON

S.A.  
Case Nos. 05-CR-36-ALL

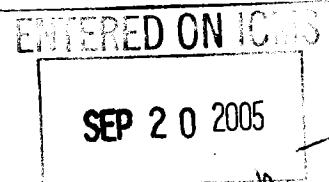
Judge James V. Selna

DEFENDANT KENNETH KETNER'S  
NOTICE OF MOTION AND MOTION  
TO IDENTIFY AND COMPEL  
DOCUMENTS AND EXCULPATORY  
EVIDENCE; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF

Date: September 19, 2005

Time: 9:00 a.m.

Ctrm: 10C



21 Defendant Kenneth Ketner ("KETNER"), through his undersigned counsel of record,  
22 hereby gives notice that on September 19, 2005 at 9:00 a.m., or as soon thereafter as the matter  
23 can be heard by the court, in courtroom 10C of the above entitled court will and hereby does  
24 move for an order requiring that the government do the following:

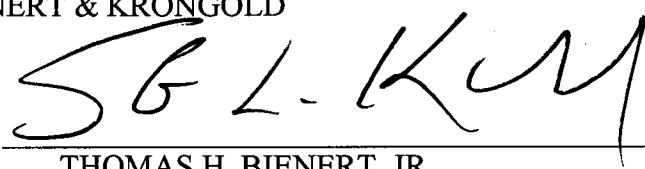
- 25 1. Immediately disclose all potentially material recordings, transcripts, reports and notes  
26 resulting from, regarding, referring or relating to the investigation and prosecution by  
27 the Government of KETNER's case, including any exculpatory or favorable evidence.

- 1        2. Identify all documents and other items that the government intends to mark as
- 2                  exhibits or to use during examination of witnesses;
- 3        3. Identify all documents or evidence that potentially contains Brady information;
- 4        4. Identify all documents or evidence that potentially contains Giglio information; and
- 5        5. Provide all of the documents referred to in the indictment.

6                  This motion is brought pursuant to Rules 12 and 16 of the Federal Rules of Criminal  
7                  Procedure, Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, and the Fifth and  
8                  Sixth Amendments to the United States Constitution. This motion is based upon the instant  
9                  notice of motion and motion, the attached memorandum of points and authorities in support  
10                 thereof, the records and files in this action, and any and all other matters that may be presented  
11                 prior to or at the time of the hearing.

12                 DATED: September 12, 2005

13                 BIENERT & KRONGOLD

14                 By: 

15                 THOMAS H. BIENERT, JR.

16                 STEVEN L. KRONGOLD

17                 JOEL M. WEINSTEIN

18                 Attorneys for Defendant KENNETH KETNER

1                   MEMORANDUM OF POINTS AND AUTHORITIES

2     **I        INTRODUCTION**

3                   Defendant Kenneth Ketner ("KETNER") is charged in a six- count indictment with Bank  
4 Fraud, Honest Services Wire Fraud, Wire Fraud, Money Laundering Conspiracy, Engaging in  
5 Monetary Transactions in Property Derived from Specified Unlawful Activities, and Aiding and  
6 Abetting. Essentially, the indictment alleges that KETNER committed these various crimes by  
7 arranging for loans on properties funded by and through Mortgage Capital Resource  
8 Corporation, a California Corporation ("MCR") through various means to the detriment of  
9 creditors Household Commercial Financial Service a warehouse lender based in Illinois  
10 ("Household") and Republic Bank, a bank insured by the Federal Deposit Insurance Corporation  
11 ("Republic").

12                  Based on the charges in the matter, an important evidentiary aspect of the case will be the  
13 degree to which KETNER, who was at times the head of MCR but involved in many other  
14 projects as well, had knowledge of certain financial transactions and loans. Thus, witness  
15 testimony regarding KETNER's business practices and actual knowledge of particular  
16 transactions and loans is significant. Any information suggesting that KETNER lacked  
17 involvement or knowledge in relevant practices or transactions is exculpatory as it tends to  
18 negate knowledge of the alleged wrongdoing.

19                  Based on the allegations and charges in this matter, KETNER believes that the  
20 government will call several witnesses at trial to testify about whom there is significant evidence  
21 of wrongdoing. Those witnesses include Val Benincosa, Randy Bristol and Alan Johnson. Yet,  
22 to date the government has not identified a single document or item that it expects to introduce  
23 at trial. **Instead, the government claims it has not one piece of exculpatory evidence in this case.**  
24 In fact, other than some reports related to Alan Johnson that this Court ordered disclosed as part  
25 of an unrelated prior motion, the government has produced *no reports* or potential impeachment  
26 information regarding any witnesses.

27                  What the government has produced instead is a partial "discovery dump" where, after  
28 disclosing its possession of the some fifty-one boxes of documents that will ultimately be

discoverable, it produced 36 of them and refuses to produce the other 15 or any information from them. The government claims that all of the additional fifteen boxes include work-product and information that need not be produced.

Defendant is informed and believes that the government has exculpatory information, including witnesses who provided evidence of KETNER's non-involvement in relevant matters and impeachment information for its witnesses. Furthermore, defendant contests the government's view that it need not produce evidence prepared and presented to the grand jury or that will ultimately be produced at trial. Defendant should not be required to sift through dozens of boxes of documents in order to first identify the evidentiary basis of the government's case so that he can defend himself.

Defense counsel and government counsel have addressed these issues and have been unable to resolve them, warranting the filing of this motion.

**II. THE PROSECUTION HAS AN OBLIGATION TO DISCLOSE AND IDENTIFY ALL INFORMATION MATERIAL TO THE CASE, INCLUDING ITEMS IT INTENDS TO USE AT TRIAL, EXCULPATORY EVIDENCE AND INFORMATION THAT COULD EFFECT THE CREDIBILITY OF THEIR WITNESSES**

Rule 16 requires the government to disclose, upon the defense's request, items "material to preparing the defense," as well as items the government "intends to use in its case-in-chief." Fed.R.Crim P. 16(a)(1)(E)(i)&(ii); see also United States v. Reeves, 892 F.2d 1223, 1226 (5th Cir. 1990); United States v. Vue, 13 F.3d 1206, 1208 (8th Cir. 1994). This "rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases." Advisory Committee Note on 1974 Amendment to Rule 16 (emphasis added).

The government is in possession of dozens of boxes of evidence and should be ordered to disclose to defendant items it intends to use at trial. Failure to make such disclosures is precluding defendant from adequately preparing for his defense.

The due process clause of the United States Constitution, Rule 16 of the Federal Rules of Criminal Procedure, as well as case law, impose a duty on the prosecution to disclose to the defense upon request, any information favorable to the accused within the prosecutor's

1 possession, either actual or constructive, that is material to defendant's guilt or to sentencing.  
 2 Brady v. Maryland, 373 US 83, 87 (1963) see also United States v. Bagley, 473 U.S. 667, 682  
 3 (1985). This principle imposes upon prosecutorial authorities a strict duty to disclose and  
 4 identify all material evidence favorable to the defense whether or not it relates directly to the  
 5 question of guilt and whether or not a request for a disclosure has been made. Giglio v. United  
 6 States, 405 U.S. 150 (1972).

7 The prosecution's discovery obligation has been enunciated by the United States  
 8 Supreme Court:

9 The State's obligation is not to convict, but to see that, so far as possible, truth  
 10 emerges. This is also the ultimate statement of its responsibility to provide a fair trial  
 11 under the Due Process Clause of the Fourteenth Amendment. No respectable interest of  
 12 the State is served by its concealment of information which is material, generously  
 13 conceived, to the case, including all possible defenses

14 Giles v. Maryland, 386 US 66, 98 (1967).

15 In this instance, since the rule announced in Brady is premised on defendant's right to  
 16 receive a fair trial, the government should be required to adopt a more liberal approach to  
 17 disclosure in this case. Brady, 387 U.S. at 87; see also Kyles v. Whitley, 514 U.S. 419, 439  
 18 (1995) ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable  
 19 piece of evidence...This is as it should be."); United States v. McVeigh, 954 F. Supp. 1411 (D.  
 20 Colo. 1997) (Matsch, J.) ("Due Process requires the government lawyers to resolve their doubts  
 21 in favor of disclosure."). Such an approach is necessary both to ensure "that justice shall be  
 22 done," and "to preserve the criminal trial, as *distinct from the prosecutor's private deliberation*,  
 23 as chosen forum for ascertaining the truth about criminal accusations." Kyles, 514 U.S. at 439-  
 40 (emphasis added).

24 Moreover, the prosecution has a duty to learn of and obtain all favorable evidence in the  
 25 possession of others acting on their behalf, including the police. Kyles v. Whitley, 115 S. Ct.  
 26 1555, 1567 (1995); United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) (prosecutor is  
 27 charged with knowledge of material known to FDA). The test for materiality is whether the  
 28

1 requested evidence *might* affect the outcome of the trial. United States v. Agurs, 427 US 97  
 2 (1976). This includes evidence which could affect the credibility of any government witness.  
 3 See Giglio, 405 U.S. 150, 154. Further, it includes evidence of bias, motive to lie or exaggerate,  
 4 prior bad acts of dishonesty or prior criminal convictions. See Generally United States v. Able,  
 5 469 U.S. 45 (1984). Accordingly, evidence favorable to KETNER includes not only evidence  
 6 tending to exculpate him, but any information that tends to impeach the government's evidence  
 7 or witnesses. See Giglio, 405 U.S. at 154; Bagley, 473 U.S. at 676. Such evidence should  
 8 include:

- 9     • The complete criminal history of any witness the government plans to  
     use at trial. Brady v. Maryland 373 U.S. 83 (1963).
- 10    • Any evidence that a witness has made a false statement, whether or not  
     under oath. U.S. v. Strifler 851 F.2d 1197 (9th Cir., 1988)
- 11    • Any evidence that a witness has made any inconsistent, contradictory or  
     false statements, including any other evidence show bias or motive to  
     fabricate by the informant. Pennsylvania vs. Ritchie 107 S.Ct. 989  
     (1987); U.S. vs. Steinberg 99 F.3rd 1486 (9th Cir., 1996)
- 12    • Any express or implicit promise, understanding, offer of immunity or  
     lesser sentence in exchange for a witness's cooperation in this or any  
     other case, Giglio v. U.S., *supra*; U.S. vs. Shaffer 789 F.2d 682 (9th Cir.  
     1986), together with copies of any plea bargain or agreement regarding  
     said cooperation.
- 13    • All e-mail or electronic data in any form involving the witnesses and/or  
     defendant. 18 U.S.C §2510-2520; 18 U.S.C §3504.
- 14    • All electronic surveillance of the defendants in any form, together with  
     any wiretaps and accompanying applications. Id.
- 15    • All recordings, including electronic, written, or otherwise, of any  
     conversations involving any witnesses and/or defendants.

1       The government has not produced such materials in this case. Thus far, it has primarily  
 2 limited its production to documents seized by agents from various locations. In doing so, ~~this~~  
 3 ~~concealing notes and reports of agents in this case, including potentially exculpatory evidence~~  
 4 ~~and the references to potentially exculpatory witnesses contained therein. Included in such~~  
 5 ~~exculpatory evidence, is information by witnesses indicating that defendant Ketner was not~~  
 6 ~~involved in certain financial aspects of MCR.~~

7       **III. THE GOVERNMENT'S "DISCOVERY DUMP" OF DOZENS OF BOXES,**  
 8 **WITHOUT IDENTIFYING PARTICULAR DOCUMENTS OR**  
 9 **INFORMATION, DOES NOT MEET THE GOVERNMENT'S DISCOVERY**  
 10 **OBLIGATION**

11       Instead of identifying relevant information required by discovery rules, the government  
 12 simply granted the defense access to a large voluminous collection of incomplete discovery  
 13 inviting them to find an exculpatory “needle in a haystack”. The Government’s position is  
 14 inconsistent with the fundamental constitutional protections afforded by Brady. The  
 15 government’s duty to comply with Brady is not fulfilled, in cases such as this, where the  
 16 prosecution buries the defendant with discovery and ignores its duty to expose the truth.

17       In United States v. Bortnovsky, 820 F.2d 572, 574-575 (2d Cir. 1987), the Second Circuit  
 18 found:

19       We conclude that appellants were hindered in preparing their defense by the  
 20 district court's failure to compel the Government to reveal crucial information:  
 21 the dates of the fake burglaries and the identity of the three fraudulent  
 22 documents. Appellants were forced to explain the events surrounding eight  
 23 actual burglaries and to confront numerous documents unrelated to the charges  
 24 pending. In effect, the burden of proof impermissibly was shifted to  
 25 appellants. *While we commend the Government for cooperating in the turning*  
*over of documents prior to trial, we do not look with favor on the manner in*  
*which the Government conducted the prosecution. The relevance of key events*  
*was shrouded in mystery at the commencement of and throughout the trial.*  
*The Government did not fulfill its obligation merely by providing mountains of*  
*documents to defense counsel who were left unguided as to which documents*  
*would be proven falsified or which of some fifteen burglaries would be*  
*demonstrated to be staged.*

26       (emphasis added); see also United States v. Turkish, 458 F.Supp.874, 882 (S.D.N.Y. 1978)  
 27 (granting defense motion directing the government to indicate which of the approximately  
 28 25,000 documents relating to the case in the government’s possession it intended to use at trial,  
 rather than “bury[ing] the defendant in paper” by merely making all of the documents available.)

1       In United States v. Poindexter, 727 F.Supp. 1470 (D.D.C. 1989), the government  
2 attempted to satisfy its obligations under Brady by turning over large volumes of discovery.  
3 According to the Poindexter Court:

4       The government has produced documents that it intends to use in its case-in-  
5 chief, but defendant contends that, with respect to financial information and  
6 various calendar and diary pages, it has done no more than to identify several  
7 thousand pages, any of which it "may" rely on at trial. This broad brush  
8 approach, defendant contends, is not sufficient to meet its obligations. The  
9 Court agrees.

10      While the government's case or strategy may change in advance of trial or  
11 even during trial, there is no reason why it cannot be more specific as to which  
12 documents it currently intends to use, and there are many reasons, grounded in  
13 fairness to the defendant, the protection of his rights, and not least Rule  
14 16(a)(1)(C), why it should be.

15      Within thirty days of the issuance of this Order, the government shall identify  
16 with greater specificity those among these thousands of documents in the  
17 financial, calendar, and diary areas that it intends to use at trial. This  
18 notification will not prevent the government from later introducing other  
19 documents from these materials on a limited scale, but it will give the  
20 defendant some notice as to which among the thousands of documents are  
21 likely to be part of the government's case-in-chief.

22      Id. at 1484; United States v. Turkish, 458 F.Supp. 874, 882 (S.D.N.Y.1978), aff'd, 623 F.2d 769  
23 (2nd Cir.1980).

24      This Court should order the government to honor its duties and produce  
25 meaningful discovery by identifying exhibits, Brady and Giglio material.

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## **IV. CONCLUSION**

For the foregoing reasons, KETNER, by and through his counsel, respectfully requests that this Court order the government to:

- (1) Identify the documents it intends to use at trial;
  - (2) Identify and produce all evidence relating to the credibility or bias of witnesses; and
  - (3) Identify and produce all exculpatory evidence and/or potentially favorable to KETNER's defense.

Respectfully submitted,

DATED: September 12, 2005

BIENERT & KRONGOLD

By:

THOMAS H. BIENERT, JR.

STEVEN L. KRONGOLD

JOEL M. WEINSTEIN

Attorneys for Defendant KENNETH KETNER

## **CERTIFICATE OF SERVICE**

I, Janine Philips, declare,

That I am a citizen of the United States and am a resident or employed in Orange County, California; that my business address is 115 Avenida Miramar, San Clemente, California 92672; that I am over the age of 18 and not a party to the above-entitled action;

That I am employed by the Thomas Bienert of Bienert & Krongold who is a member of the United States District Court for the Central District of California, at whose direction I served a copy of **DEFENDANT KENNETH KETNER'S MOTION TO IDENTIFY AND COMPEL DOCUMENTS AND EXCULPATORY EVIDENCE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action as follows:

BY MAIL: I am "readily familiar" with Bienert & Krongold's practice for collecting and processing mail with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at San Clemente, California on that same day following the ordinary business practices addressed to:

BY FACIMILE: On said date, I caused said document(s) to be transmitted by facsimile. The telephone number of the sending facsimile was (949) 496-6753. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The document was transmitted by facsimile transmission, and the sending facsimile machine properly issued a transmission report confirming that the transmission was complete and without error.

BY FEDEX: I deposited such document in a box or other facility regularly maintained by FedEx, or delivered such document(s) to a courier or driver authorized by FedEx with delivery fees paid or provided for, addressed to the person(s) being served as follows:

X BY HAND DELIVERY: I caused to have delivered such envelope(s) by hand to the office of the person being served via First Legal as follows

**SEE ATTACHED SERVICE LIST**

This certificate was executed on September 12, 2005, at San Clemente, California.

I certify under penalty of perjury that the foregoing is true and correct.

 Janine Philips

**SERVICE LIST**  
**USA v. Ketner**  
**Case No. 05-CR-36-ALL**

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